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Office of the United States Political
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MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the Ministry of Foreign Affairs, Tokyo, Japan.

Date: Tuesday, March 11, 1952 SIXTH INFORMAL MEETING

ARTICLE IX

Mr. Otabe expressed the belief that it might be difficult to implement paragraph 1 (b) of this Article with respect to an American in Japan who might be a legal resident domiciled in a state which imposes restrictions on Japanese ownership of real property, since he might attempt to circumvent this clause by claiming another state as his domicile. Mr. Mori inquired how the Japanese authorities might determine the actual domicile of an American citizen.

Mr. Bassin pointed out that a person's domicile is a place where a man has a true, fixed and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. It is a place where a man has voluntarily fixed the resident of himself and family not for a mere special or temporary purpose, but with the present intention of making a permanent home for an unlimited or indefinite period. Mr. Bassin said that the key to determining a person's domicile is his intent. He pointed out that the intent may be inferred from various circumstances. For example, if a person pays taxes, votes, maintains a home and family, keeps bank accounts and other property in a state, the presumption is that he is domiciled in that state. His admissions in documents may be also used to ascertain his intent concerning domicile. In this respect his passport may be utilized in making the determination. He added that a more important decision facing the Japanese Government concerned the domicile of corporations or companies. The latter determination would be quite simple since the domicile of a judicial person would be evident in the documentation required for registration in Japan.

Mr. Otabe inquired whether the provisions of Article IX would govern the acquisition of property rights in the United States by an American company in which a Japanese national might have acquired an interest in conformity with Article VII of this treaty. Mr. Otabe further inquired whether an American company duly organized or controlled by Japanese nationals would be entitled to acquire land in the United States like any other American company. He further added that any foreigner or foreign juridical person whose country or state imposes prohibitions or restrictions on the enjoyment of rights by Japanese nationals or Japanese juridical persons with respect to land, will be subject to similar prohibitions or restrictions with respect to the enjoyment of land ownership in Japan. With respect to the implementation of this principle, and in conformity with the Alien Land Law, a company organized in Japan by foreign nationals or juridical persons will, in this connection, be regarded as a company of the state, country or countries of such foreigners when the latter (a) comprise not less than one half of the members, shareholders, or executive officers of such company, or (b) control not less than one half of the capital of such company, or (c) represent the majority of the votes in such company.

With reference to Mr. Otabe's first question, Mr. Adams replied that the provisions of this Article applied only to Japanese companies doing business in the United States and that the FCN Treaty does not govern the activities of American nationals and companies in the United States, or of Japanese in Japan. Mr. Bassin then added, in response to Mr. Otabe's second question, that an American company duly organized under United States law, in which Japanese nationals participated, would be entitled to acquire real estate. He pointed out, however, that the extent of alien ownership in certain fields of activity was limited by law in the United States. In the acquisition of mining rights, for example, participation by aliens was limited to not more than 25 per cent

of the stock ownership of the enterprise involved. Within these limits on alien participation, however, American companies with alien stockholders were entitled to acquire real estate.

Mr. Otabe again raised the question of determining a person's domicile, adding that this was considered a most important point. Mr. Bassin replied that this could be determined by questioning the person and examining his documentation, and that the Japanese authorities were free to decide this point, based on the evidence available.

Mr. Otabe requested clarification of the expression "enterprises carrying on particular types of activities" as used in paragraph 4, Article IX.

Mr. Bassin replied that this wording envisages primarily domestic corporations operating in the fields enumerated in paragraph 2 (first sentence) of Article VII. Thus, he said, the broad national treatment rule on acquiring and owning personalty (including stocks) set forth in the first sentence of paragraph 4, Article IX, cannot become a loophole through which the reservations of Article VII, paragraph 2, may be circumvented. Mr. Bassin pointed out that this question was closely related to Article VII concerning business activities and that when the questions pending on Article VII are resolved, paragraph 4, Article IX would, in his opinion, be clarified.

Mr. Otabe stated that Japan desired to specify reservations under Article IX which are regarded as necessary to safeguard Japan's external financial position or balance of payments position, as well as reservations necessitated by Japanese laws concerning foreign investments. He observed that in the course of the meetings on the ITO Charter, the United States delegation agreed that the receiving country had the right to decide whether or not to accept foreign investments, and that such a reservation is made in Article XII, paragraph 1 (c) (ii) of the Havana Draft which states that a member has the right to determine whether and to what extent and upon what terms it will allow future foreign investment. He added that under current Japanese regulations, for example, restrictions are imposed on (a) the acquisition of new shares of stocks by a foreign investor who desires to remit the dividends in a foreign currency; (b) the acquisition of old shares of stocks by a foreign investor; (c) the conclusion of renewal of technical assistance contracts whose period of payment extends over one year; and (d) the acquisition of debentures or claimable assets arising from loans. He added that in these cases a foreign investor must apply to the Foreign Investments Commission for validation and approval of any contract entered into or renewed, and report to the Commission when any stock has been acquired under such a contract.

Mr. Adams replied that the question raised by Mr. Otabe was closely related to Article VII, and suggested that further discussion on this point be deferred until the questions on Article VII were resolved.

Mr. Otabe then stated that Japan wanted to include a reservation in Article IX on certain matters covered by the Marine Transportation Law. He said that this law requires all persons or organizations under the Japanese laws to obtain specific permission from the Ministry of Transportation prior to acquiring or leasing a vessel from an alien. This law also requires Ministry of Transportation approval of any transfer of a Japanese vessel to alien ownership and/or registry. Mr. Otabe added that this reservation might be necessary in order to clarify that national treatment for aliens does not extend to the selling or purchasing of vessels, since Japanese nationals and companies could easily sell or buy among themselves without Ministry of Transportation's approval.

Mr. Adams replied that the FCN Treaty prescribed the rights and obligations of the nationals of either party in relation to the government of the other party. Any regulations governing transfers of shipping ownership and/or registry are applied by a government to its own nationals and not to the alien buyers or sellers. Mr. Adams added that this point therefore had no relation to the provisions of Article IX, and that such controls over the transfer of registry of national shipping were generally applied by all maritime countries.

Mr. Otabe suggested that Article IX be regarded as pending and proposed that discussions continue with the next Article.

ARTICLE X

Mr. Otabe suggested that the phrase as "upon compliance with the laws and regulations with respect to registration and other formalities" (as used in the United States' FCN Treaty with Italy) be added to this Article X in order to avoid any future misunderstanding.

Mr. Adams replied that the phrase suggested by Mr. Otabe was employed in the FCN Treaty with Italy in lieu of the phrase "obtaining and maintaining", but that it was understood that the latter phrase in Article X of the Standard Draft meant the obtaining and maintaining of patents and inventions in accordance with appropriate laws and regulations.

Mr. Otabe and Mr. Miyagawa asked for a definition of "trade marks, trade names, trade labels", as used in Article X. Mr. Singer replied that a trade mark was a distinguishing mark, device or symbol (including the use of distinctive letters, characters or type) used by a manufacturer or merchant on his goods. A trade name was defined as the distinguishing name used by a manufacturer or a merchant for his goods, as well as the distinguishing name of the firm or concern itself under which a concern does business. Mr. Singer added that a trade label was the distinctive marking or label, (usually, but not always, comprising one or more trade names and/or trade marks) identifying the goods of a manufacturer or merchant.

Mr. Otabe inquired why copyrights were not included among the various industrial property rights mentioned in Article X, and whether some other arrangement was contemplated to cover copyright matters.

Mr. Adams replied that there exists an expeditious and adequate executive procedure in the United States which is more suitable than an FCN Treaty for dealing with bilateral copyright relations. This is a Presidential Proclamation, which establishes the requisite reciprocity, and it is found more convenient and expedient than an FCN Treaty by the competent copyright authorities. The use of this procedure, he added, saves the FCN Treaty from becoming involved in technical complications that sometimes arise in the copyright field.

Mr. Otabe stated that these definitions were clear and satisfactory to the Japanese side. He added that there were no further questions on Article X, and that, in the light of the explanations received, further consideration would be given to this Article with respect to the Japanese suggestion that the phrase "upon compliance with the laws and regulations with respect to registration and other formalities" be added. Mr. Otabe proposed that the meeting adjourn until Thursday, March 13, when discussions could begin on Article XI.

/s/ M. Yukawa

Morio Yukawa
Director
Economic Affairs Bureau
Ministry of Foreign Affairs

/s/ Frank A. Waring

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